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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RICHARD GERALD JORDAN,
Petitioner,

v.

STATE OF MISSISSIPPI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

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QUESTIONS PRESENTED

1. Whether, in a capital sentencing proceeding, exclusion of virtually all evidence of a defendant's socially useful behavior while in prison and other mitigating evidence is consistent with *Lockett v. Ohio*, 438 U.S. 586 (1978), and the requirement of individualized sentencing.

2. Whether a death sentence imposed by a jury based in part on a finding that the murder was "especially heinous, atrocious or cruel" is consistent with *Godfrey v. Georgia*, 446 U.S. 420 (1980), when (a) the jury received no instruction at all as to the meaning of this aggravating circumstance, (b) no facts sufficient to support any constitutional construction of this aggravating circumstance were found at either the trial or the appellate level, and (c) there were substantial mitigating circumstances that the jury was required to weigh against the aggravating circumstances.

3. Whether the prosecutor's closing argument, filled with numerous references to the prosecutor's personal beliefs and experience, repeated references to Petitioner's failure to take the stand at previous trials, admonitions to the jury to do its "duty," and disparaging references to Petitioner's exercise of his constitutional rights, denied Petitioner a fair trial in violation of the Fourteenth Amendment or otherwise violated Petitioner's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments.

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No.

RICHARD GERALD JORDAN,
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v.

STATE OF MISSISSIPPI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

Richard Gerald Jordan (Petitioner) petitions for a writ of certiorari to review the judgment of the Supreme Court of Mississippi in this case.

OPINIONS BELOW

The Supreme Court of Mississippi, by a five-to-four vote, affirmed Petitioner's sentence of death, which had been entered by the Circuit Court of Harrison County, Mississippi, following a jury trial. The majority and dissenting opinions of the Supreme Court of Mississippi are reported at 464 So. 2d 475 and are reprinted at App. 1a-33a.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3) (1982). On January 30, 1985, the Supreme Court of Mississippi (four justices dissenting) affirmed Petitioner's death sentence. On March 13, 1985,

that court (four justices again dissenting) denied Petitioner's petition for rehearing, without issuing an opinion.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

Fifth Amendment to the Constitution of the United States of America: "No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life . . . without due process of law . . . ."

Sixth Amendment to the Constitution of the United States of America: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."

Eighth Amendment to the Constitution of the United States of America: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Fourteenth Amendment to the Constitution of the United States of America: "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

Section 99-19-101 of the Mississippi Code of 1972 Annotated, as amended in 1977 and 1983: "(3) For the jury to impose a sentence of death, it must unanimously find in writing the following: . . . (c) That there are insufficient mitigating circumstances, as enumerated in subsection (6), to outweigh the aggravating circumstances. . . . (5) Aggravating circumstances shall be limited to the following: . . . (h) The capital offense was especially heinous, atrocious or cruel. . . . (6) Mitigating circumstances shall be the following: (a) The defendant has no significant history of prior criminal activity."

STATEMENT OF THE CASE

This case arises from the direct appeal to the Supreme Court of Mississippi of a sentence of death imposed on April 29, 1983. No case related to that sentence has

previously been before this Court, but certain previous proceedings involving Petitioner—resulting in sentences that were vacated as unconstitutional—are pertinent to the present petition.

On January 12, 1976, Petitioner killed Edwina Marter by a single gunshot to the head, producing instantaneous death. On January 13, 1976, Petitioner confessed to the killing but stated that he had not intended to hit anyone with the shot that he fired. Petitioner had no prior criminal record.

In July 1976, the State of Mississippi prosecuted Petitioner for capital murder. Petitioner did not take the stand in his own behalf, but his confession was introduced in evidence. The jury returned a guilty verdict, and a sentence of death automatically followed under the Mississippi statute then in effect. The trial court, however, granted Petitioner a new trial after the Supreme Court of Mississippi, to avoid constitutional problems, declared the statute not to provide for a mandatory death penalty.

On February 28 and March 1 and 2, 1977, the State again prosecuted Petitioner for capital murder. Petitioner did not testify, but his confession was once again introduced. The jury found Petitioner guilty and returned a death sentence. On August 6, 1982, the United States Court of Appeals for the Fifth Circuit ordered that a writ of habeas corpus issue, providing that Petitioner receive a sentence less than death unless resentenced at another hearing.[1] The Fifth Circuit found that the jury had not been instructed in accordance with *Godfrey v. Georgia*, 446 U.S. 420 (1980), and "could have considered any number of potentially arbitrary and irrelevant unspecified factors"—indeed, that the prosecutor had encouraged it to do so.[2]

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[1] *Jordan v. Watkins*, 681 F.2d 1067, *reh'g denied*, 688 F.2d 395 (5th Cir. 1982).

[2] 681 F.2d at 1082.

A new sentencing hearing, conducted under a new Mississippi statute,[3] began on April 26, 1983. The defense called some eighteen witnesses who testified, among other things, to Petitioner's good character and his loving relationship with his wife and children. In an effort to demonstrate to the jury that Petitioner could be rehabilitated and could make a meaningful contribution to society if allowed to live, Petitioner also proffered substantial testimony regarding his actions in the years since the crime, but virtually all such evidence was excluded as irrelevant. As stated in more detail below, the trial court sustained every single objection to the testimony of prison guard Lucius Brown regarding Petitioner's exemplary behavior while in prison.[4] And another witness who would have testified about Petitioner's actions while in prison—specifically, about a significant invention by Petitioner—was not even allowed to take the stand at all.[5]

Petitioner testified in his own behalf. As in his 1976 confession, Petitioner testified that the killing had been unintentional,[6] and in all other material respects Petitioner's testimony was identical to his confession.

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[3] Miss. Code Ann. § 99-19-101 (Cum. Supp. 1983).

[4] *See* Tr. 856-69, App. 41a-51a.

[5] *See id.* at 922-23, App. 52a-53a.

[6] *Compare* Transcript of Proceedings on Appointment of Attorney at 2035, *State v. Jordan*, No. 491 (County Court of Harrison County, Miss., Jan. 13, 1976) (transcript of tape-recorded confession) ("She started running down the hill. At that time I took my pistol, I didn't even have it in my hand. I took it out of the waist band of my trousers and I was going to fire a shot over her head, just a warning type shot . . . ."), *with* Tr. 973-74 ("I glanced back at her, and she had started to run. I just hollered stop and reached for the gun in my trousers about the same time. The gun was on the left side. And I pulled it out and was just going to shoot, I would say from shoulder level, just to scare her; to let her know to stop.").

At the close of the evidence, the state and Petitioner proposed instructions. Petitioner objected to the state's instruction on the ground (among others) that the aggravating circumstance of an "especially heinous, atrocious or cruel" crime constitutionally must be limited to murders involving torture or the like, which differ from this case.[7] One of Petitioner's proposed instructions would have limited this aggravating circumstance by using the precise words that the Supreme Court of Mississippi had used to narrow it. Nonetheless, the trial court granted the state's proposed instruction, which simply repeated the statutory language and provided the jury with no guidance at all as to the limits of this aggravating circumstance, and refused all of Petitioner's proposed limiting instructions.[8]

After the jury was instructed, one of the prosecutors began closing argument for the state. Immediately he referred to Petitioner's silence at his prior trials, and immediately defense counsel objected. As stated in more detail below, the prosecutor then embarked on a wide-ranging discussion of his personal position, his beliefs, the jury's "duty," and Petitioner's exercise of his constitutional rights. All defense objections and motions for mistrial were summarily overruled.[9]

On April 29, 1983, following more than three hours of deliberations, the jury returned a verdict of death, finding (among other things) that the crime was "especially heinous, atrocious or cruel." On May 13, 1983, the court denied a motion for new trial in which Petitioner argued that the trial errors included exclusion of mitigating evidence, improper instruction on the "heinous, atrocious or

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[7] Petitioner first made this argument in a pretrial motion. *See* Tr. 61-63, App. 37a-39a.

[8] *See id.* at 1184-86, 1218-19, 1221, 1078-87, App. 54a-62a. Indeed, every one of Petitioner's 36 proposed instructions was refused.

[9] *See id.* at 1090-108, 1157-58, App. 63a-78a.

cruel" aggravating circumstance, and improper denial of Petitioner's motions for mistrial based on the closing argument.[10] All of these arguments were also raised on appeal to the Supreme Court of Mississippi,[11] which, by five votes to four, affirmed Petitioner's sentence on January 30, 1985, and denied his rehearing petition on March 13, 1985.[12]

REASONS FOR GRANTING THE WRIT

This case, which sharply divided the Supreme Court of Mississippi, raises three important issues that fully deserve review under this Court's Rule 17(b) and (c). In Part I, we show that the majority below, in a decision with far-reaching implications, upheld the exclusion of substantial mitigating evidence. That decision is in clear violation of *Lockett v. Ohio*, 438 U.S. 586 (1978), and is inconsistent with numerous decisions of lower federal and state courts. In Part II, we show that the court's application of the "heinous, atrocious or cruel" aggravating circumstance completely ignores the requirements of *Godfrey v. Georgia*, 446 U.S. 420 (1980), and directly conflicts with a decision of a federal court of appeals. Finally, in Part III, we show that the prosecutor engaged in egregious misconduct in closing argument, raising important constitutional questions that have not been, but should be, settled by this Court. All of these issues repeatedly arise in death-penalty cases, and the combination of all the errors below shows such fundamental unfairness in the trial that certiorari is appropriate.

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[10] *See id.* at 1236-43, App. 79a-82a.

[11] Relevant portions of Petitioner's initial brief to that court are reprinted at App. 83a-96a.

[12] *See* App. 1a-34a, 36a. An order entered March 4, 1985, staying Petitioner's execution "pending final disposition of [his] Petition for Rehearing and further order of this Court," remains in effect. App. 35a.

I. Petitioner Was Improperly Prevented from Presenting Substantial Mitigating Evidence in Clear Violation of this Court's Mandate in *Lockett v. Ohio*.

Over the dissent of four justices, the Supreme Court of Mississippi below upheld the exclusion of significant mitigating evidence proffered by Petitioner. In a decision that we believe is unprecedented, the majority in effect deemed irrelevant evidence of positive, socially beneficial conduct engaged in by a capital defendant after the commission of the crime, such as Petitioner's invention of an alternative means for generating electricity. That decision, which is flatly inconsistent with *Lockett v. Ohio*, 438 U.S. 586 (1978), and with the constitutional requirement of individualized sentencing in capital cases, warrants this Court's review. A clear statement is needed from this Court that, under *Lockett*, jury consideration of a capital defendant's actions cannot be artificially restricted in time to those that take place before the crime.

Throughout Petitioner's sentencing proceeding, defense efforts to present mitigating evidence concerning Petitioner's conduct following the crime were severely curtailed. Indeed, one potentially critical witness proffered by the defense was precluded from testifying at all. That witness would have testified about an invention—in which the Tennessee Valley Authority had expressed considerable interest—that Petitioner had made, after the commission of the crime and while in prison, for generating electricity from energy sources such as wind tunnels.[13] The trial judge evidently viewed the invention as irrelevant simply because it concerned "thoughts and ideas developed by Mr. Jordan since he has been in prison."[14]

Similarly, the testimony of a number of defense witnesses was substantially restricted. For example, the

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[13] *See* Tr. 922, App. 52a.

[14] *Id.*, App. 52a.

defense sought to present the testimony of Officer Lucius Brown, a guard in the Mississippi State Penitentiary, regarding Petitioner's exemplary behavior in prison following the crime. After asking Officer Brown a few background questions,[15] defense counsel sought to inquire about Petitioner's conduct and attitude in prison; however, the prosecution repeatedly objected to these questions, and the trial court sustained every objection.[16] The

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[15] The questions to which the prosecution did not object concerned merely the witness' background and his appointment of Petitioner as hall man for the cell block. *See id.* at 856-58, App. 40a-43a. The statement in the majority opinion below that Officer Brown was permitted to testify "in detail as to circumstances surrounding the life and character of [Petitioner]" (464 So. 2d at 485, App. 19a) is simply inaccurate. We have included in the appendix the entire examination of Officer Brown, including the prosecution's cross-examination, during which the state was permitted—over the objections of defense counsel—to ask questions concerning misconduct in which other death row prisoners had engaged (Tr. 863-64, App. 46a-47a), to suggest that Petitioner had been on death row longer than virtually any other prisoner in Mississippi (Tr. 864-65, App. 47a-48a), and to demand the witness' badge number in order to insinuate to the jury that the witness was doing something wrong in testifying (Tr. 869, App. 51a).

[16] Q. Officer Brown, does the job of hall man require your placing a degree of trust in the person selected?

BY MR. OWEN: May it please the Court, we object to this. First of all, this is three years after the crime.

BY THE COURT: I sustain it.

. . .

BY MR. HUDSON: Q. Has Gerald Jordan ever demonstrated any violent tendencies?

A. Not to my knowledge.

BY MR. OWEN: May it please the Court, we object to that. . . .

BY THE COURT: Sustained.

. . .

Q. How would you characterize [the defendant's] attitude?

A. Peaceful, well mannered person—

[Footnote continued]

effect—again—was virtually as if the witness had been precluded from taking the stand altogether.

The majority below upheld these exclusions of mitigating evidence without any analysis or citation of authority, terming the proffered evidence "not . . . reasonably relevant to the question of whether or not Jordan should suffer death or be sentenced to life in prison." [17] As noted by the dissent in relation to the excluded testimony concerning Petitioner's invention, this holding is fundamentally at odds with the concept of individualized sentencing that is at the very heart of this Court's death-penalty jurisprudence:

> No basis in fact, reason or legal authority is offered for [the majority's] conclusion. Why is evidence that Jordan may have made a useful invention—and presumably, has the ability to make more—not

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[16] [Continued]

BY MR. NECAISE: We object to that . . . .

BY THE COURT: Sustained.

BY MR. HUDSON: Q. Do you know the reputation of the Defendant for peace and violence?

BY MR. NECAISE: We object to that, if the Court please.

BY THE COURT: Sustained. . . .

. . .

BY MR. HUDSON: Q. Do you know, Officer Brown, whether or not this is a defendant that can be rehabilitated?

BY MR. NECAISE: We object to that, if the Court please.

BY THE COURT: Sustained.

BY MR. HUDSON: Q. Is it true, Officer Brown, that other inmates in M.S.U. frequently have fights on the yard?

A. Yes.

Q. Has Gerald Jordan ever been involved in any of them?

BY MR. NECAISE: Objection.

BY THE COURT: Sustained.

Tr. 858-60, App. 43a-44a.

[17] 464 So. 2d at 485, App. 19a.

> relevant to the question of whether he should suffer death? We are simply not told.
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> . . . .
>
> I can say with confidence . . . that there are not just a few persons within our society who, faced with a life or death determination, would regard it as relevant that the defendant, since his crime and incarceration, had applied his wit and ingenuity and made an invention that would benefit society. Not all of us are without the capacity to see as proper the amelioration of the harshness of the law in the face of genuine repentence, pursuit of atonement and demonstrably responsible behavior.[18]

This Court has repeatedly admonished that the sentencing body in a capital case must be allowed to consider the individual circumstances of the crime and the character of the particular defendant. In *Woodson v. North Carolina*, 428 U.S. 280 (1976), for example, the Court struck down a mandatory death-penalty statute, reasoning that "in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." [19] And in *Lockett v. Ohio*, 438 U.S. 586 (1978), the Court reaffirmed this principle. Describing the issue presented as "which facets of an offender or his offense [are] 'rele-

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[18] *Id.* at 490-91, App. 30a (Robertson, J., dissenting).

[19] 428 U.S. at 304 (plurality opinion); *see also Roberts (Harry) v. Louisiana*, 431 U.S. 633, 637 (1977) (per curiam) ("it is essential that the capital-sentencing decision allow for consideration of whatever mitigating circumstances may be relevant to either the particular offender or the particular offense"); *Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325, 333-34 (1976) (plurality opinion) (striking down a mandatory death-penalty statute because it "afford[s] no meaningful opportunity for consideration of mitigating factors presented . . . by the attributes of the individual offender").

vant' in capital sentencing," [20] the Court concluded that "the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor, any aspect of a defendant's character or record* and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." [21]

The reason for the *Lockett* rule is to ensure that, before a jury imposes the ultimate criminal sanction, it has been allowed to consider fully any potential mitigating or humanizing circumstances surrounding the defendant's life that might suggest a lesser punishment. But that is precisely what the jury was not permitted to do here. The jury was not permitted to consider Petitioner's invention and model behavior in prison. Had those factors been brought to the jury's attention, they would have shown the jury that Petitioner could make a positive contribution to society while in prison—if allowed to live.

There is no plausible reason why evidence of positive steps taken by a capital defendant should be kept from a jury simply because they occurred after the crime.[22] In this regard, the majority's holding not only is inconsistent with the central thrust of *Lockett*, but it is in direct conflict with numerous decisions by lower courts imple-

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[20] 438 U.S. at 604 (plurality opinion).

[21] *Id.* (footnotes omitted) (emphasis added in part); *see also Eddings v. Oklahoma*, 455 U.S. 104 (1982) (vacating a capital sentence because it was imposed following a trial in which the sentencer's consideration of mitigating evidence had been restricted).

[22] The dissent below made clear the complete unfairness of the majority's approach: "We have held repeatedly that *bad* things that a capital defendant does *after* his crime may be shown as aggravating circumstances. . . . It certainly follows that *good* things the defendant does *after* the commission of the crime may be shown in mitigation." 464 So. 2d at 488, App. 25a (Robertson, J., dissenting) (emphasis in original).

menting the *Lockett* mandate. Both state and federal courts have repeatedly held relevant and admissible evidence of positive actions taken by a capital defendant—regardless of whether they occurred before or after the defendant's crime and incarceration.[23] The split between the Supreme Court of Mississippi here and the other lower federal and state courts regarding this critical question warrants this Court's review.

Nor can the improper exclusion of the proffered testimony concerning Petitioner's invention be salvaged, as the majority below sought to do, by suggesting that the evidence might have been hearsay. As noted by the dissent,[24] there is absolutely nothing in the record to support the majority's speculation. And, even if one assumes *arguendo* that the excluded evidence would have been hearsay, this Court has cautioned that " 'the hearsay rule may not be applied mechanistically to defeat the ends of justice' " by excluding mitigating evidence in a capital sentencing proceeding. *Green v. Georgia*, 442 U.S. 95, 97 (1979) (per curiam) (quoting *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973)).[25] The majority's total dis-

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[23] *See, e.g., Washington v. Watkins*, 655 F.2d 1346 (5th Cir. 1981), *cert. denied*, 456 U.S. 949 (1982); *People v. Harris*, 36 Cal. 3d 36, 679 P.2d 433, 201 Cal. Rptr. 782, *cert. denied*, 105 S. Ct. 365 (1984); *State v. Watson*, 129 Ariz. 60, 628 P.2d 943, 946-47 (1981) ("[t]he fact that [the defendant] has been a model prisoner and has attempted to further his education can and should be considered"); *see also Simmons v. State*, 419 So. 2d 316 (Fla. 1982) (reversing a death sentence because mitigating evidence concerning the defendant's capacity for rehabilitation had been excluded).

[24] *See* 464 So. 2d at 489, App. 26a-27a (Robertson, J., dissenting).

[25] *Cf. Williams v. New York*, 337 U.S. 241, 247 (1949) ("modern concepts individualizing punishment have made it all the more necessary that [the sentencing body] not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence").

As noted by the dissent below, the majority invoked "[a]nother red herring," 464 So. 2d at 489, App. 27a (Robertson, J., dis-

regard for *Green* and its unfounded speculation only serve to underscore the need for review by this Court.

II. Petitioner's Capital Sentence Violated the Requirements of *Godfrey v. Georgia*.

In *Godfrey v. Georgia*, 446 U.S. 420 (1980), this Court made clear that, while a capital sentence can constitutionally be based on a finding that the murder was particularly heinous, the state must channel the sentencing body's discretion in making this finding, so as to ensure that the decision to impose the death sentence is based on clear, objective standards reflecting "reason rather than caprice or emotion." [26] No such channeling occurred here, and Petitioner's sentence of death is based, to an extent that cannot be known, on a wholly unguided finding by the jury that the murder was "especially heinous, atrocious or cruel"—a finding that the Supreme Court of Mississippi on appeal did not independently review. The total disregard below for the *Godfrey* mandate warrants this Court's review.

At the conclusion of the sentencing hearing, the trial judge instructed the jury that one of the statutory ag-

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senting), by arguing that the *Lockett* violation was somehow less significant simply because Petitioner might have attempted to testify about the invention himself. When Petitioner took the stand, the trial court had already excluded as irrelevant the proffered testimony about the invention, and Petitioner cannot be faulted for respecting the trial court's ruling. More important, the majority's suggestion would make a mockery of *Lockett*. Because the jury is likely to view the testimony of a capital defendant with extreme suspicion, other witnesses are typically called to provide mitigating character evidence. Yet the reasoning of the majority below would authorize the complete exclusion of all such evidence whenever the defendant is competent to testify about his own background—i.e., in virtually all, if not all, cases. The implications of that reasoning are sufficiently important, if *Lockett* is to have any real meaning, to merit this Court's review.

[26] 446 U.S. at 433 (plurality opinion).

gravating circumstances it could consider was whether the murder was "especially heinous, atrocious or cruel." The trial court provided the jury with absolutely no guidance as to what this open-ended language meant.[27] Indeed, it refused to give any of the limiting instructions proposed by Petitioner, including one that would have defined the phrase exactly as the Supreme Court of Mississippi had—that the aggravating circumstance is limited to "the conscienceless or pitiless crime that is unnecessarily torturous to the victim." [28]

As a result, the jury's finding of this aggravating circumstance provides no "meaningful basis" [29] for the imposition of the death penalty in this case. Any murder could be deemed "especially heinous, atrocious or cruel." As this Court stated in *Godfrey* in relation to a similar statutory aggravating circumstance:

> There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as "outrageously or wan-

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[27] Tr. 1184, App. 55a; *see* Miss. Code Ann. § 99-19-101(5)(h) (Cum. Supp. 1983). The judge simply listed the aggravating circumstances that the jury could consider, using verbatim the language of the statute.

[28] Tr. 1221, App. 60a; *see Coleman v. State*, 378 So. 2d 640, 648 (Miss. 1979). The Supreme Court of Mississippi in *Coleman* adopted this definition from *Spinkellink v. Wainwright*, 578 F.2d 582, 611 (5th Cir. 1978), *cert. denied*, 440 U.S. 976 (1979).

The other two limiting instructions that were refused would have informed the jury that it could not find the murder especially "heinous, atrocious or cruel" (1) if it found that "the victim died a quick death without unnecessary pain and torture" or (2) unless it found that the murder "was accompanied by acts of torture." Tr. 1218-19, App. 58a-59a.

[29] *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (plurality opinion) (quoting *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring)).

> tonly vile, horrible and inhuman." Such a view may, in fact, have been one to which members of the jury in this case subscribed. If so, their preconceptions were not dispelled by the trial judge's sentencing instructions. These gave the jury no guidance concerning the meaning of [the aggravating circumstance's] terms. In fact, the jury's interpretation of [the aggravating circumstance] can only be the subject of sheer speculation.[30]

Despite the clear holding in *Godfrey*, the Supreme Court of Mississippi below concluded that no clarifying instruction was required because "the meaning of such terms is a matter of common knowledge, so that an ordinary man would not have to guess at what was intended." [31] This holding—which has been endorsed only by a bare majority of the justices on that court—flies in the face of *Godfrey*. As four members of the Supreme Court of Mississippi [32] and a unanimous panel of the United States Court of Appeals for the Eleventh Circuit [33] have recognized, the failure to provide a narrow-

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[30] 446 U.S. at 428-29 (plurality opinion).

[31] 464 So. 2d at 478, App. 4a (quoting *Spinkellink v. Wainwright*, 578 F.2d at 611). The court of appeals decision in *Spinkellink* preceded *Godfrey*, and on this point it no longer can be considered good law. *Cf. Proffitt v. Wainwright*, 685 F.2d 1227, 1261-62 n.52 (11th Cir. 1982) (concluding that a related aspect of *Spinkellink* is no longer valid in light of *Godfrey*), *cert. denied*, 104 S. Ct. 508 (1983).

[32] *Edwards v. State*, 441 So. 2d 84, 96 (Miss. 1983) (Prather, J., dissenting) ("We should adopt [a limiting] jury instruction requirement as . . . mandated by *Godfrey*. It is obvious that the average juror does not know our own narrow construction of the words 'especially heinous, atrocious or cruel.' "). In subsequent cases, including the present one, the court has viewed the five-vote majority opinion in *Edwards* as controlling. *See* 464 So. 2d at 478, App. 4a.

[33] *See Proffitt v. Wainwright*, 685 F.2d at 1265.

ing instruction rendered the jury's finding "standardless and unchanneled." [34]

Nor was this constitutional defect in the sentence cured through appellate review. On appeal, the Supreme Court of Mississippi did not apply a constitutionally narrow construction of the aggravating circumstance and determine that the murder properly came within its terms. Instead, it merely concluded that the "facts constituted a question for the jury as to whether the killing was especially heinous, atrocious and cruel." [35] But if the issue constituted a question for the jury, then it was clearly crucial that the jury be properly instructed [36]—something that unquestionably did not occur. As in *Godfrey*, nothing said or done by the Supreme Court of Mississippi on appeal eliminated this critical flaw in the capital sentence.

To be sure, the jury found two other aggravating circumstances,[37] and this Court has held that under some circumstances the presence of one improper aggravating circumstance does not necessarily render a capital sentence arbitrary and unconstitutional, if there are other proper aggravating circumstances. But this case is fundamentally different from *Zant v. Stephens*, 462 U.S. 862 (1983), and *Barclay v. Florida*, 463 U.S. 939 (1983). Unlike the Georgia statute in *Zant*, the Mississippi stat-

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[34] *Godfrey v. Georgia*, 446 U.S. at 429 (plurality opinion).

[35] 464 So. 2d at 478, App. 4a.

[36] Even if arguably a properly instructed, hypothetical jury could have found the murder "especially heinous, atrocious or cruel," it clearly also could have reached the opposite result. The evidence was undisputed that the victim, Edwina Marter, died instantaneously from a single bullet wound. And there was no evidence of any torture, rape, or assault.

[37] The two circumstances were that the murder was committed (1) for pecuniary gain and (2) during the commission of a kidnapping. *See* Miss. Code Ann. § 99-19-101(5)(f), 99-19-101(5)(d) (Cum. Supp. 1983).

ute specifically requires the jury to balance the aggravating and mitigating circumstances in reaching its sentencing determination;[38] unlike in *Barclay*, there were substantial mitigating factors in this case, both statutory and nonstatutory.[39] There is simply no way to know whether the jury would have sentenced Petitioner to death had it received a limiting instruction on the "especially heinous, atrocious or cruel" aggravating circumstance.

Recognizing this fact, the Supreme Court of Florida has repeatedly held that a capital sentence based in part on an improper aggravating circumstance must be vacated if significant mitigating circumstances are present,[40] and four justices of the Supreme Court of Mississippi have also concluded that a capital sentence cannot stand in such circumstances.[41] A majority of the justices of the Supreme Court of Mississippi, however, have in effect determined that the existence of significant mitigating factors can be ignored and a death sentence can be affirmed, no matter how many unconstitutional aggravating circumstances exist, so long as a single proper aggravating circumstance is present.[42] The split between

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[38] *See* Miss. Code Ann. § 99-19-101(3)(c) (Cum. Supp. 1983).

[39] The record established, for example, that Petitioner had no significant history of prior criminal activity, a statutory mitigating circumstance. *See* Miss. Code Ann. § 99-19-101(6)(a) (Cum. Supp. 1983). The uncontradicted testimony of numerous witnesses also revealed that Petitioner had been a loving father and husband. And, of course, as discussed previously, had other testimony not been improperly excluded, the existence of other, compelling mitigating factors would have been disclosed to the jury.

[40] *See, e.g., Moody v. State*, 418 So. 2d 989, 995 (Fla. 1982), *cert. denied*, 459 U.S. 1214 (1983); *Riley v. State*, 366 So. 2d 19, 22 (Fla. 1979); *Elledge v. State*, 346 So. 2d 998, 1002-03 (Fla. 1977).

[41] *See Edwards v. State*, 441 So. 2d at 96 (Prather, J., dissenting).

[42] *See Edwards v. State*, 441 So. 2d at 91-92.

the highest courts in Mississippi and Florida, and the strong division within the Mississippi court, demonstrate that this is a troubling constitutional question, meriting this Court's attention.

Indeed, this issue is among the most critical in the death-penalty area generally. As this Court is aware, the capital sentencing statutes of many states include an aggravating circumstance such as "especially heinous, atrocious or cruel," and it is found applicable by juries in most, if not all, capital cases.[43] A sharply divided Supreme Court of Mississippi has in effect held, in direct conflict with *Godfrey*, that it is simply irrelevant that jurors are given no guidance as to what this potentially boundless phrase contemplates. Stating that the issue was one for the jury, it also has seen no need to review the jury's finding itself. And it has viewed as insignificant the existence of substantial mitigating factors that may very well have led the jury to give Petitioner a life sentence had it been properly instructed. The result is a wholly arbitrary sentence based on the finding of an aggravating circumstance that provides no "principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it [is] not."[44] Certiorari is appropriate.

III. The Prosecutor Engaged in Egregious Misconduct in Closing Argument, Substantially Prejudicing the Fairness of Petitioner's Sentencing Trial.

Repeated prosecutorial misconduct during closing argument seriously prejudiced the fairness of Petitioner's sentencing trial, and such misconduct is a widespread

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[43] *See Godfrey v. Georgia*, 446 U.S. at 454 (White, J., dissenting) (noting that this factor had been the exclusive or nonexclusive basis for the imposition of a death sentence in over 30 Georgia cases); *Proffitt v. Wainwright*, 685 F.2d at 1263 (referring to the "numerous" Florida cases involving this aggravating circumstance).

[44] *Godfrey v. Georgia*, 446 U.S. at 433 (plurality opinion).

problem that deserves this Court's attention. Dean Pound observed in 1930 that "[w]e must go back to the seventeenth century—to the trial of Raleigh or to the prosecutions under Jeffreys—to find parallels for the abuse and disregard of forensic propriety which threatens to become staple in American prosecutions." [45] Ever since, commentators have cited with increasing alarm the frequency of prosecutorial misconduct,[46] and the caseload of this Court and the federal courts of appeals suggests that the problem is only getting worse, particularly in capital sentencing proceedings.[47] Just this Term this Court has heard two cases involving improper closing argument. *United States v. Young*, 105 S. Ct. 1038 (1985); *Caldwell v. Mississippi*, No. 83-6607 (U.S. argued Feb. 25, 1985).

This case presents even more compelling prosecutorial misconduct than did either *Young* or *Caldwell*. Special Assistant District Attorney Joe Sam Owen was the first person to address the jury following instructions. He began his argument by emphasizing Petitioner's fail-

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[45] R. Pound, *Criminal Justice in America* 187 (1930).

[46] *See, e.g.*, Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 Tex. L. Rev. 629, 631 (1972); Hobbs, *Prosecutor's Bias, an Occupational Disease*, 2 Ala. L. Rev. 40, 50 (1949); Singer, *Forensic Misconduct by Federal Prosecutors—and How It Grew*, 20 Ala. L. Rev. 227, 227 (1968); Note, *Prosecutor Forensic Misconduct—"Harmless Error"?*, 6 Utah L. Rev. 108 (1958).

[47] In 1983 and 1984, the United States Court of Appeals for the Eleventh Circuit alone decided four death-penalty cases involving prosecutorial misconduct of constitutional dimension. *Hance v. Zant*, 696 F.2d 940, 951-53 (11th Cir.), *cert. denied*, 103 S. Ct. 3544 (1983); *Tucker v. Zant*, 724 F.2d 882, 886-90, *reh'g en banc granted*, 724 F.2d 898 (11th Cir. 1984) (No. 83-8137); *Tucker v. Francis*, 723 F.2d 1504, 1506-08, *reh'g en banc granted*, 723 F.2d 1518 (11th Cir. 1984) (No. 83-8466); *Brooks v. Francis*, 716 F.2d 780 (11th Cir. 1983), *reh'g en banc granted*, 728 F.2d 1358 (11th Cir. 1984) (No. 83-8028). The grants of *en banc* rehearing in three of those cases demonstrate the importance of the issue presented and the need for guidance by this Court.

ure to testify at the guilt phases of his previous trials. The trial court overruled defense counsel's immediate objection,[48] and Owen quickly proceeded to state:

> You are going to hear the statement of counsel opposite about the duty and responsibility of the District Attorney's Office to prosecute and see that the death penalty is imposed.[49] But *I tell you as I stand here*, I am not a member of the District Attorney's Office. *I'm a Special Prosecutor; I haven't been assigned to nor affiliated with the District Attorney's Office in seven (7) years. I am not a proponent of the death penalty in every case.* I have never advocated that, and I don't advocate that to you today. *But what I tell you* is that there are cases that exist that warrant the imposition of the death penalty. *And I have never in my eleven (11) years of practice ever seen a case so atrocious, so cruel and inhumane, that justifies the death penalty as this particular case does.*[50]

After two more references to Petitioner's exercise of his Fifth Amendment rights,[51] Owen proceeded to complain to the jury about "the ordeal we have gone through for three days [and] the same thing when we tried it; seven, eight or nine days of trial" [52] because Petitioner had counsel and "got all of the Constitutional Rights afforded him." [53] Again bemoaning "what has happened to our society" and complaining that "we have got to spend days here arguing" because of Petitioner's constitutional rights, Owen suggested that exercise of those rights meant that Petitioner "can maybe slip in some

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[48] Tr. 1090-91, App. 64a.

[49] Defense counsel made no such statement.

[50] Tr. 1091-92, App. 64a-65a (emphasis added).

[51] *Id.* at 1098, 1102, App. 69a, 72a-73a.

[52] The guilt phase of Petitioner's trial had in fact lasted three days (February 28 and March 1 and 2, 1977).

[53] Tr. 1103, App. 73a.

legal technicality, . . . can employ some type of legal gymnastics." [54] Owen then returned to the subjects of his personal feelings, position, and experience and the jury's "duty":

> *I feel strongly about this case. And I'm not going to sit here as an officer of the Court and lie to you about the facts in this case.* They speak the truth. . . . I tell you, each and every one of you, that *you have a duty and a job consist*[*e*]*nt with the oath that you took when it was administered to you*—to impose the death penalty when the facts and circumstances are warranted. And they are warranted here. . . . You talking about society; Kevin is now ten (10). He was three (3) when his mother died. The oldest son is seventeen (17). They are the ones who are going to look back and see what justice is. My momma was shot down in the woods with a .38, and her murderer got life imprisonment.[55]

Defense counsel's prompt objection was summarily overruled. Owen then closed by emphasizing his own disbelief of Petitioner's testimony; by noting his own and the district attorney's Catholic faith and their belief in the death penalty; by telling the jurors, "I expect you to help us bring to a conclusion this seven years"; by appealing to the jurors as "law abiding, Christian citizens"; and by suggesting that they "stand on" their "duty and . . . awesome responsibility." [56]

The prosecutor's closing remarks were plainly improper. Indeed, even the State of Mississippi has admitted that similar arguments in *Caldwell* "may have been inappropriate, undesirable, or universally condemned." [57]

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[54] *Id.* at 1103-04, App. 73a-74a.

[55] *Id.* at 1104, App. 74a (emphasis added).

[56] *Id.* at 1105-07, App. 75a-76a.

[57] Brief for the Respondent at 62, No. 83-6607 (filed Jan. 7, 1985).

In *Young*, this Court stated that "[t]he prosecutor was . . . in error to try to exhort the jury to 'do its job'; that kind of pressure . . . has no place in the administration of criminal justice." [58] Statements of personal belief in closing argument have been widely and strongly condemned.[59] Owen's complaints about Petitioner's exercise of his constitutional rights were of the variety that courts have described as "altogether improper." [60] And, in truly egregious misconduct, Owen in effect offered himself as an "expert" in crime to the jury—and one who deserved special credibility because he was a special prosecutor. He expressly relied on his eleven years of practice as a basis to "tell" the jury that a comparison of this case with others, about which the jury had no evidence, showed the appropriateness of the death penalty. Such "testimony," subject to no cross-examination and inherently believable to a lay jury, has received—and deserves—universal condemnation.[61]

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[58] 105 S. Ct. at 1048; *see also id.* at 1054 (Brennan, J., concurring in part and dissenting in part) ("Many courts historically have viewed such warnings about not 'doing your job' as among the most egregious forms of prosecutorial misconduct."); *State v. Jones*, 277 Minn. 174, 152 N.W.2d 67, 77-78 (1967); *State v. Thomas*, 168 N.J. Super. 10, 401 A.2d 693, 696 (App. Div. 1979).

[59] *See, e.g., United States v. Bess*, 593 F.2d 749, 753, 757 (6th Cir. 1979) (expressing "astonishment" at prosecutor's "inexcusable" conduct); *Stewart v. United States*, 247 F.2d 42, 47-48 (D.C. Cir. 1957) (opinion of Fahy, J.) (reversing death sentence because of prosecutor's statement of personal belief).

[60] *E.g., Commonwealth v. Joyner*, 469 Pa. 333, 365 A.2d 1233, 1234-35 (1976); *see also id.* at 1236 (prosecutor's expressions of personal belief "emphatically condemned"); *United States v. Hughes*, 389 F.2d 535 (2d Cir. 1968).

[61] *See, e.g., Berger v. United States*, 295 U.S. 78, 88 (1935) ("improper suggestions, insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none"); *Tucker v. Zant*, 724 F.2d at 889 ("Such arguments are objectionable because their effect is to assure the jurors that someone with greater experience

The factors that led the Court to uphold a conviction despite similar misconduct in *Young* are absent from the present case. *First*, unlike *Young*, this was a death case. In a capital case, more than in any other, the passion of jurors can easily be aroused; as this Court has admonished, it is especially important in this context that the verdict be "based on reason rather than caprice or emotion." [62] In this case, the jury had to make the highly subjective determination of whether Petitioner should live or die, comparing evidence of a serious crime with considerable testimony about the positive aspects of Petitioner's character. It is simply inconceivable that the jury's delicate task of balancing these factors was not affected by Owen's assurance that a sentence of death would not be out of line with other cases, his admonition that a sentence of life imprisonment would be, and all his inflammatory rhetoric. The misconduct cannot be dismissed, as in *Young*, on the groud that the evidence of guilt was overwhelming.

Second, no lawyer had addressed the jury in summation before Owen, and no mention of his personal characteristics or beliefs had been (or was) made; thus,

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has already made the decision that the law imposes on them."); *Hance v. Zant*, 696 F.2d at 951; *State v. Butler*, 277 S.C. 543, 290 S.E.2d 420, 421 (1982) (unanimously reversing death sentence because remarks similar to Owen's injected an arbitrary factor into sentencing in violation of Eighth Amendment); *State v. Smith*, 279 N.C. 163, 181 S.E.2d 458 (1971); *State v. Farrell*, 61 N.J. 99, 293 A.2d 176, 178 (1972); Alschuler, *supra* note 46, at 634 & n.22; Note, *The Nature and Consequences of Forensic Misconduct in the Prosecution of a Criminal Case*, 54 Colum. L. Rev. 946, 955-56 & n.49, 958 & n.58 (1954) (collecting cases); *see also Young*, 105 S. Ct. at 1043 n.5, 1048.

[62] *Godfrey v. Georgia*, 446 U.S. at 433 (plurality opinion); *Gardner v. Florida*, 430 U.S. 349, 358 (1977) (plurality opinion); *see also Brooks v. Francis*, 716 F.2d at 788; *Hance v. Zant*, 696 F.2d at 951. Moreover, as a Texas prosecutor wrote: "There is perhaps no place where argument reigns more supreme than in the sentencing hearing . . . ." Crump, *The Function and Limits of Prosecution Jury Argument*, 38 Sw. L.J. 505, 528 (1974).

there was no "invited response" of the sort that seemed decisive in *Young*. *Third*, this Court is not limited to the "plain error" issue described as "principal" in *Young*,[63] since defense counsel objected to Owen's improper argument.[64] *Fourth*, Owen clearly "impl[ied] that the prosecutor had access to evidence outside the record," [65] specifically the details of other murder cases; it was because *no* such implication was present in the prosecutor's remarks in *Young* that the Court deemed those remarks not a basis to overturn a conviction.

The fundamental unfairness resulting from prosecutorial misconduct rose to the high level required for reversal in a state criminal case.[66] Owen's remarks were hardly "ambiguous" or "a few brief sentences"; [67] his personal beliefs were the beginning, the ending, and the centerpiece of his jury argument.[68] And, as noted above, prosecutorial misconduct is likely to have a particularly significant effect in a capital case.

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[63] 105 S. Ct. at 1042.

[64] Similarly, in *Caldwell*, the state argues primarily that the improper prosecutorial remarks were invited and that there were no contemporaneous objections—arguments that are inapplicable here.

[65] *Young*, 105 S. Ct. at 1048.

[66] The "fundamental unfairness" test in this context stems from *Donnelly v. DeChristoforo*, 416 U.S. 637, 645 (1974). In addition, Owen's comments negated the careful channeling of jury discretion required under the Eighth Amendment in a capital case. And we respectfully support the position of Bobby Caldwell, petitioner in No. 83-6607, that remarks such as these constitute a violation of the Confrontation Clause. *See generally* Carlson, *Argument to the Jury and the Constitutional Right of Confrontation*, 9 Crim. L. Bull. 293 (1973).

[67] *Donnelly*, 416 U.S. at 645, 647.

[68] *See Berger v. United States*, 295 U.S. at 89 ("we have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential").

Despite all of this misconduct, the Supreme Court of Mississippi did not even see a need to address this issue on appeal, although raised in Petitioner's opening brief, reply brief, and rehearing petition. That court appears ready, from now on, to condone any closing argument, no matter how emotionally charged or filled with references to personal opinion. This Court should grant certiorari so that cases such as this one do not become even more common.

This becomes still more apparent when one considers a related issue that the Supreme Court of Mississippi did address: Petitioner's claim under *Griffin v. California*, 380 U.S. 609 (1965). After acknowledging that Owen repeatedly called attention to Petitioner's prior exercise of his Fifth Amendment rights, the court simply held that any defendant who testifies at the sentencing phase of a capital trial completely waives his right under *Griffin* to be free of adverse comment on his failure to testify at the culpability phase.[69] That holding misread this Court's precedent.

This Court has never held that prior silence may always be used by the prosecutor. Instead, the Court has consistently required a threshold determination that the particular situation is one "in which silence is . . . more probative than prejudicial." [70] To be sure, this Court has declared that the determination is governed by state evi-

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[69] 464 So. 2d at 482, App. 12a-13a.

[70] *Jenkins v. Anderson*, 447 U.S. 231, 240 (1980); *see Stewart v. United States*, 366 U.S. 1, 5 (1961) ("*[I]n no case has this Court intimated that there is such a basic inconsistency between silence at one trial and taking the stand at a subsequent trial that the fact of prior silence can be used to impeach any testimony which a defendant elects to give at a later trial.*") (emphasis added); *id.* at 5-6 (noting that in *Raffel v. United States*, 271 U.S. 494 (1926), the impeached testimony was a direct contradiction of evidence given by the same witness at an earlier trial); *Tucker v. Francis*, 723 F.2d at 1510 ("the constitutional issues are largely resolved by the probative value determination").

dence law. But that does not mean that a state can declare *all* silence to be more probative than prejudicial, and it clearly does not mean that a state court may allow use of prior silence *without* making any attempt to determine whether it is more probative than prejudical.[71] Because the Supreme Court of Mississippi completely failed to take account of the limitations that this Court has imposed on comment on prior silence, and because the prosecution repeatedly referred to Petitioner's prior silence as part of its continuing grandstand play before the jury, certiorari is appropriate.

CONCLUSION

This case presents three issues, each of sufficient importance that certiorari should be granted. Indeed, the *combined* effect of the rulings of the trial court, upheld by the Supreme Court of Mississippi, was to deny Petitioner any semblance of a fair trial before a jury whose discretion was adequately channeled. Each juror who sat through this trial was (1) unaware that Petitioner had spent his time in jail peacefully and productively; (2) under the false impression, uncorrected by instructions in accordance with *Godfrey*, that it could deem all murders "heinous, atrocious or cruel"; and (3) told by an "officer of the Court" that Petitioner's exercise of his constitutional rights, including his right to remain silent, had put everyone through an ordeal, and that, if the facts of other cases were in evidence, Petitioner would be shown uniquely deserving of death. Such a juror, we submit,

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[71] Nor, on the facts of this case, could Petitioner's prior silence be found more probative than prejudicial. Petitioner's testimony regarding the facts of the crime was identical to his contemporaneous confession in 1976, which was introduced in the prior trials. Thus, the situation was not at all like *Raffel v. United States*, 271 U.S. 494 (1926), where exculpatory testimony could have been but was not offered in the prior trial, nor was it like *Jenkins v. Anderson*, 447 U.S. 231 (1980), where prearrest silence was inconsistent with a claim of self-defense.

was many, many times more likely to vote for death than a juror who knew of Petitioner's societal contributions, was properly instructed that "heinous, atrocious or cruel" applies only to those crimes that are "unnecessarily torturous to the victim," and had only the evidence in this case (and argument as to reasonable inferences from that evidence) as a basis to make the life-or-death determination.

It is not this Court's role to correct every error, or even every constitutional error, committed by state and lower federal courts, but neither is it this Court's role to allow a person to be executed on the basis of a record showing as much fundamental unfairness as this one. The issues discussed above are recurring ones of great importance in capital cases; they are especially important because the Supreme Court of Mississippi has disregarded binding precedent of this Court and has reached decisions in conflict with federal courts of appeals and other state courts of last resort. We respectfully request that certiorari be granted.

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